



DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

Enhancing Highway Workforce Development Opportunities Contracting Initiative

AGENCY: Federal Highway Administration (FHWA), U.S. Department of Transportation (DOT).

ACTION: Notice.

SUMMARY: The recently enacted Bipartisan Infrastructure Law (BIL), enacted as the Infrastructure Investment and Jobs Act, authorizes a recipient or subrecipient of a grant provided by the DOT Secretary under Title 23 or 49, United States Code, to implement a local or other geographical or economic hiring preference relating to the use of labor for construction of a project funded by the grant subject to any applicable State and local laws, policies, and procedures. Based on this statutory authorization, FHWA is announcing a transition from its initiative announced in May 2021, which permitted, on an experimental basis, recipients and subrecipients of Federal funds for Federal-aid highway projects to utilize geographic, economic, or other hiring preferences or innovative contracting approaches not otherwise authorized by law. The May 2021 initiative was carried out as a pilot program under FHWA's existing experimental contracting authority and the legal authority in the Section 199B of the Consolidated Appropriations Act, 2021, authorizing such hiring preferences "not otherwise authorized by law." Now that BIL creates the legal authority for local or other geographical or economic hiring preferences, an experimental pilot program for such hiring preferences is no longer needed. In Addition, the use of such preferences going forward are subject to Section 25019 of the BIL, not Section 199B of the Consolidated Appropriations Act, 2021.

DATES: This action is applicable immediately.

FOR FURTHER INFORMATION CONTACT: For technical information: Mr.

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SUPPLEMENTARY INFORMATION:

Electronic Access

An electronic copy of this document may be downloaded from the Office of the Federal Register's Website at www.FederalRegister.gov and the Government Publishing Office's Website at www.GovInfo.gov.

Bipartisan Infrastructure Law

The BIL, enacted as the Infrastructure Investment and Jobs Act, Pub. L. 117-58 (Nov. 15, 2021), authorizes a recipient or subrecipient of a grant provided by the DOT Secretary under Title 23 or 49, United States Code (U.S.C.), to implement a local or other geographical or economic hiring preference relating to the use of labor for construction of a project funded by the grant, including prehire agreements, subject to any applicable State and local laws, policies, and procedures. BIL, § 25019(a)(1). The BIL also provides that the use of a local or other geographical or economic hiring preference authorized by Section 25019(a)(1) in any bid for a contract for the construction of a project funded by a grant described in Section 25019(a)(1) shall not be considered to unduly limit competition. BIL, § 25019(a)(2).

Enhancing Highway Workforce Development Opportunities Contracting Initiative

On May 21, 2021, at 86 FR 27667, FHWA announced an initiative to permit and evaluate geographic, economic, or other hiring preferences or innovative contracting approaches not otherwise authorized by law that have the potential to enhance workforce development opportunities in the transportation construction industry, including for low-

income communities. As discussed in the Federal Register notice for that initiative, FHWA historically disallowed such requirements out of concern for their potential impact on competition. Generally, Federal law requires Federal-aid highway and roadway projects (apart from a few exceptions) to be awarded on the basis of competitive bidding.

The initiative announced in May 2021 was authorized under Section 199B of the Consolidated Appropriations Act, 2021, Pub. L. 116-260, Dec. 27, 2020, 134 Stat 1182, which allowed DOT-assisted contracts under Titles 49 and 23 of the U.S.C. to use geographic, economic, or any other hiring preference not otherwise authorized by law, with certain limitations including required certifications. The initiative was also based on FHWA's Special Experimental Project No. 14 (SEP-14) authority for special experimental projects set forth at 23 U.S.C. 502(b)(2) to allow FHWA to continue to gather data and evaluate experimental contracting practices.

Under the May 2021 initiative FHWA required State and local recipients and subrecipients to request prior approval from FHWA to use a specific contracting requirement under SEP-14 by submitting work plans to the appropriate FHWA Division Office.

Transition from Pilot Program

Based on the statutory authority for local or other geographical or economic hiring preferences in Section 25019(a) of the BIL, FHWA is transitioning from its initiative announced in May 2021. Since Section 25019 authorizes the use of certain hiring preferences, the use of such preferences going forward are subject to Section 25019 of the BIL, not Section 199B of the Consolidated Appropriations Act, 2021. Also, while local hiring preferences have traditionally been disallowed in accordance with 23 CFR 635.117(b) and 636.107, given the statutory authority for local or other geographical or economic hiring preferences under the BIL, an experimental pilot program is no longer

needed for labor hiring preferences that fall within the legislatively authorized parameters. Innovative contracting approaches or requirements, including those related to workforce development, falling outside of the parameters authorized by Section 25019(a) of the BIL may still be considered by FHWA under its experimental SEP-14 authority on a case-by-case basis.

Upon publication of this notice, and based on Section 25019(a) of the BIL, FHWA approval is no longer needed for authorized labor hiring preferences. As discussed in the Federal Register notice announcing the May 2021 initiative, DOT generally exercises discretion under 23 U.S.C. 112 to evaluate whether a State or local law or policy is compatible with the competitive bidding requirement under the statute. The DOT has historically disallowed certain hiring preferences out of concern for their potential impact on competition. Based on the clear direction in Section 25019(a)(2) of the BIL that the use of a local or other geographical or economic hiring preference authorized by Section 25019(a)(1) shall not be considered to unduly limit competition, DOT will not engage in or have a role in evaluating the effects on competition, if any, of labor hiring preferences expressly authorized under the BIL. Although DOT evaluation is no longer required, State and local recipients and subrecipients remain responsible for ensuring that the establishment and implementation of a hiring preference is otherwise consistent with applicable Federal, State, and local laws as provided in Section 25019(a)(1).

State and local recipients and subrecipients may continue to administer any contracts authorized under the May 2021 initiative for the duration of these contracts per the requirements of their approved workplans. The FHWA may continue to use SEP-14 to authorize and evaluate contracting methods that are outside the scope of Section 25019(a) of the BIL.

AUTHORITY: Section 25019 of Pub. L. 117-58; 23 U.S.C. 502(b); Section 199B of the Consolidated Appropriation Act, 2021.

Stephanie Pollack,
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Federal Highway Administration.

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